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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1656

JOHN C. MOE, ET AL.,

Appellants,

v.

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, ET AL.,

Appellees.

No. 75-50

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, ET AL.,

Appellants,

v.

JOHN C. MOE, ET AL.,

Appellees.

On Appeal from the United States District Court for the District of Montana

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BRIEF FOR THE APPELLEES (AND CROSS-APPELLANTS)

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INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, THE TREATY AND FEDERAL AND STATE STATUTES INVOLVED	3
QUESTION PRESENTED	3
STATEMENT OF THE CASE	4
A. Introduction	4
B. General Background	4
C. The Cigarette Tax Case—*Moe*	9
D. The Income Tax Case	12
E. The Personal Property Tax Case—*Montana*	13
SUMMARY OF ARGUMENT	14
ARGUMENT	16
I. *McCLANAHAN* v. *ARIZONA STATE TAX COMM'N* AND ITS CONTROLLING PRECEDENT CONTROL THE MERITS OF THESE CONSOLIDATED APPEALS, THUS IMMUNIZING THE TRIBAL PARTIES FROM ALL STATE TAXATION JURISDICTION HERE INVOLVED	16
A. The District Court Correctly Held That the State Lacked Jurisdiction to Impose Its Personal Property Taxes on Tribal Members Residing on the Reservation and That It Could Not Impose Its Cigarette Sales and Licensing Tax Laws on Those Members	17
B. The District Court Erred in Holding That Tribal Members Who Sell Cigarettes Must Precollect the Tax on Sales to Non-Indians	22

INDEX—Continued

	Page
C. The State's Lack of Authority to Tax Indians on the Flathead Reservation Is Jurisdictional, Based on the Constitution, Treaties and Applicable Federal Statutes and Does Not Involve Racial Discrimination	25
D. The District Court Properly Rejected the Argument That the General Allotment Act Gave Montana Jurisdiction Over Indians Holding Fee Patents	29
II. THE DISTRICT COURT CORRECTLY HELD THAT THE CASES BELOW WERE NOT BARRED BY 28 U.S.C. § 1341 AND THAT FEDERAL JURISDICTION EXISTS WITH RESPECT TO THE TRIBES PURSUANT TO 28 U.S.C. § 1362 AND THE INDIVIDUAL TRIBAL MEMBERS PURSUANT TO 28 U.S.C. § 1343 AND 42 U.S.C. § 1983	32
CONCLUSION	35
APPENDIX A	A-1
APPENDIX B	B-1
APPENDIX C	C-1

CITATIONS

CASES:

	Page
Agua Caliente Band of Mission Indians v. *County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972)	16, 33
Carpenter v. *Shaw*, 280 U.S. 363 (1930)	18
Confederated Salish and Kootenai Tribes v. *The State of Montana*, Civil No. 2157 (D. Mont., filed May 17, 1972)	12
Confederated Salish and Kootenai Tribes v. *Moe*, 392 F. Supp. 1297 (D. Mont. 1975)	*passim*
Confederated Salish and Kootenai Tribes v. *State of Montana*, 392 F. Supp. 1325 (D. Mont. 1975)	*passim*
Department of Employment v. *United States*, 385 U.S. 355 (1966)	33
Kennerly v. *District Court*, 400 U.S. 423 (1971)	25
Kimball v. *Callahan*, 493 F.2d 564 (9th Cir. 1974), *cert. denied*, 419 U.S. 1019 (1975)	27
Mahoney v. *State of Idaho Tax Comm'n.*, 96 Ida. 59, 524 P.2d 187 (1974), *cert. denied*, 419 U.S. 1089 (1974)	22
Mattz v. *Arnett*, 412 U.S. 481 (1973)	7, 31
McClanahan v. *Arizona State Tax Comm'n.*, 411 U.S. 164 (1973)	*passim*
Menominee Tribe v. *United States*, 391 U.S. 404 (1968)	27
Mescalero Apache Tribe v. *Jones*, 411 U.S. 145 (1973)	33
Morton v. *Mancari*, 417 U.S. 535 (1974)	15, 26, 29
Morton v. *Ruiz*, 415 U.S. 199 (1974)	18
Parker v. *Levy*, 417 U.S. 733 (1974)	29
Poafpybitty v. *Skelly Oil Co.*, 390 U.S. 365 (1968)	34
Secretary of the Navy v. *Avrech*, 418 U.S. 676 (1974)	29
Security State Bank v. *Pierre*, 162 Mont. 298, 511 P.2d 325 (1973)	21
Seminole Nation v. *United States*, 316 U.S. 286 (1942)	34
Seymour v. *Superintendent*, 368 U.S. 351 (1962)	7, 31
Squire v. *Capoeman*, 351 U.S. 1 (1956)	19

CITATIONS—Continued

	Page
State v. *McClure*, 127 Mont. 534, 268 P.2d 629 (1954)	21
Tonasket v. *State of Washington*, 84 Wash.2d 164, 525 P.2d 744, appeal dismissed for want of substantial question, 420 U.S. 915 (1975)	22
United States v. *Arlington County*, 326 F.2d 929 (4th Cir. 1964)	16, 32, 34
United States v. *Burland*, 441 F.2d 1199 (9th Cir. 1971), *cert. denied*, 404 U.S. 842 (1971)	18
United States v. *Kagama*, 118 U.S. 375 (1886)	25
United States v. *Livingston*, 179 F. Supp. 9 (E.D. S.C. 1959), *aff'd*, 364 U.S. 281 (1960)	33
United States v. *Mazurie*, 419 U.S. 544 (1975)	15, 16, 29, 30
United States v. *United States Fidelity and Guaranty Co.*, 309 U.S. 506 (1940)	16, 35
Village of Walthill v. *Omaha Tribe*, 460 F.2d 1327 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973)	29
Ward v. *Board of County Comm'rs.*, 253 U.S. 17 (1920)	24
Warren Trading Post Co. v. *Arizona Tax Comm'n.*, 380 U.S. 685 (1965)	23, 24
Williams v. *Lee*, 358 U.S. 217 (1959)	22, 23, 24
Worcester v. *Georgia*, 31 U.S. 515 (1832)	17

FEDERAL CONSTITUTION, TREATIES AND STATUTES:

United States Constitution, Art. I, sec. 8, cl. 3	10, 15, 26
Navajo Treaty of June 1, 1868, 15 Stat. 667	18
Treaty of Hell Gate of July 16, 1855, 12 Stat. 975	4, 18, 34
Arizona Enabling Act of June 20, 1910, 36 Stat. 557	19
Buck Act, 4 U.S.C. §§ 105 *et seq.* (1947)	20
Federal Power Act of June 10, 1920, § 10(e), 41 Stat. 1063, 1068-69, as amended, 16 U.S.C. § 803(e)	34

CITATIONS—Continued

	Page
General Allotment Act of February 8, 1887, § 6, 24 Stat. 388, as amended, 25 U.S.C. § 349	15, 29, 30, 31
Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§ 461 *et seq.*	6, 30, 31
Klamath Termination Act of August 13, 1954, 68 Stat. 718, 25 U.S.C. §§ 564 *et seq.*	27
Menominee Restoration Act of December 22, 1973, 87 Stat. 770, 25 U.S.C. §§ 903 *et seq.*	27, 30
Menominee Termination Act of June 17, 1954, 68 Stat. 250, 25 U.S.C. §§ 891 *et seq.*	27
Montana Enabling Act of February 22, 1889, 25 Stat. 676	5, 6, 19
Montana Territorial Act of May 26, 1864, 13 Stat. 85	5, 19
Act of March 3, 1885, 23 Stat. 362	31
Act of April 23, 1904, 33 Stat. 302	6
Act of March 4, 1909, 35 Stat. 1088	31
Act of June 28, 1932, 47 Stat. 336	31
Act of June 25, 1948, 62 Stat. 683	31
Act of May 24, 1949, 63 Stat. 89	31
Act of August 15, 1953, 67 Stat. 588 (Public Law 280)	3, 6, 10, 20, 28, 30
Act of April 11, 1968, 82 Stat. 73, 25 U.S.C. §§ 1321 *et seq.*	6, 28, 30
10 U.S.C., generally	29
18 U.S.C. § 1151	7, 31
18 U.S.C. §1154	30
18 U.S.C. § 1161	30
18 U.S.C. § 1162	6, 21,27
25 U.S.C., generally	29
25 U.S.C. § 349	29
25 U.S.C. § 461	31
25 U.S.C. § 462	31
25 U.S.C. § 1321	6, 21, 28
25 U.S.C. § 1322	6, 21, 28
25 U.S.C. § 1323	29
28 U.S.C. § 1253	3
28 U.S.C. § 1341	16, 32, 33, 34, 35

CITATIONS—Continued

	Page
28 U.S.C. § 1343	32
28 U.S.C. § 1360	6, 21, 27
28 U.S.C. § 1362	16, 32, 34, 35
28 U.S.C. § 2284	10, 13
42 U.S.C. § 1983	32
50 U.S.C., generally	29

STATE CONSTITUTION AND STATUTES:

Montana Constitution (1889), Vol. 1, Revised Code of Montana (R.C.M.) 1947 at 83	6
Montana Constitution, Ordinance I, sec. 2, (1889), Vol. 1, R.C.M. 1947 at 328	6, 19
Montana Constitution (1972), Vol. 1, R.C.M. 1947 (Supp. 1974 at 43)	6
Montana Constitution, Art. I (1972), Vol. 1, R.C.M. 1947 (Supp. 1974 at 44)	6
§ 53-114, R.C.M. 1947	13, 14
§§ 53-1025 to 53-1029, R.C.M. 1947	13
§§ 83-801 to 83-806, R.C.M. 1947	7
§ 84-201, R.C.M. 1947	13
§ 84-301, R.C.M. 1947	13
§ 84-404, R.C.M. 1947	13
§ 84-406, R.C.C. 1947	13, 14
§ 84-409, R.C.M. 1947	13
§ 84-410, R.C.M. 1947	13
§ 84-4201, R.C.M. 1947	13
§ 84-4202, R.C.M. 1947	13
§ 84-5606, R.C.M. 1947	9
§ 84-5606.3, R.C.M. 1947	9
§ 84-5606.10, R.C.M. 1947	9, 23
§ 84-5606.11, R.C.M. 1947	23
§ 84-5606.12, R.C.M. 1947	23
§ 84-5606.18, R.C.M. 1947	25
§ 84-5606.31, R.C.M. 1947	25

CITATIONS—Continued

CONGRESSIONAL MATERIALS:

	Page
H.R. Con. Res. 108, 67 Stat. B132 (1953)	28
H.R. REP. No. 93-572, 93d Cong., 1st Sess. (1973)	27
H.R. 7319, 83d Cong., 2d Sess. (1954)	28
S. REP. No. 93-604, 93d Cong., 1st Sess. (1973)	27
S. 2750, 83d Cong., 2d Sess. (1954)	28
Termination of Federal Supervision Over Certain Tribes of Indians, Joint Hearings on S. 2750 and H.R. 7319 Before the Subcommittee of the Committees of Interior and Insular Affairs, 83d Cong., 2d Sess. (1954)	28

MISCELLANEOUS:

Proclamation (Governor of Montana) of October 8, 1965	8
Tribal Ordinance 40-A (Revised), May 7, 1965	7, 8

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BRIEF FOR THE APPELLEES (AND CROSS-APPELLANTS)

OPINIONS BELOW

These consolidated appeals arise from two separate suits decided by the same three-judge district court.

In *Confederated Salish and Kootenai Tribes, et al.* v. *Moe, et al.* (hereafter "the cigarette tax case" or "*Moe*"), the Opinion and Order and the Supplemental Opinion and Order of the district court (appendix to Appellants' Jurisdictional Statement ("App.") 37-71 and 11-35, respectively) are reported at 392 F. Supp. 1297. An earlier Memorandum Opinion is unreported (App. 73-86). The Memorandum of the Court accompanying its judgment also is unreported (appendix to Cross-Appellants' Jurisdictional Statement ("Cross-App.") 1a-2a).

In *Confederated Salish and Kootenai Tribes, et al.* v. *State of Montana, et al.* (hereafter "the personal property tax case" or "*Montana*"), the Order and Opinion of the district court (App. 3-10) is reported at 392 F. Supp. 1325.

JURISDICTION

The judgments of the court below in both *Moe* and *Montana* were entered on March 19, 1975 (App. 89-91 (*Moe*) and 93-95 (*Montana*)). Two groups of defendants in each case filed timely notices of appeal on May 6, 1975 (App. 99-102 (*Moe*) and 103-106 (*Montana*)), and on May 15, 1975 (App. 107-110 (*Moe*) and 111-114 (*Montana*)). A single jurisdictional statement for all defendants in both *Moe* and *Montana* was filed on June 30, 1975 (No. 74-1656).

Plaintiffs in *Moe*[1] filed on May 16, 1975, a timely notice of appeal of one issue in that case (Cross-App. 3a-4a). Their jurisdictional statement on cross-appeal

[1] Except for plaintiff Joseph Wheeler, who died during the litigation (392 F. Supp. at 1301, n. 4; App. 40, n. 4).

was filed on July 9, 1975 (No. 75-50). The Court noted probable jurisdiction on October 6, 1975, and the cases were consolidated.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS, THE TREATY AND FEDERAL AND STATE STATUTES INVOLVED

Appellees are not dissatisfied with the list of these laws which is cited in Appellants' brief ("App. Brf.") 3, and which are reprinted in the appendix to Appellants' Jurisdictional Statement (App. 115-end).[2]

QUESTION PRESENTED

Whether the State of Montana can constitutionally apply and enforce its personal property tax and cigarette sales tax and dealer licensing statutes and related regulations on federally recognized Indian tribes and their members residing on the Flathead Indian Reservation, when the state has not acted to assume specific jurisdiction to tax those tribes and their Indians pursuant to the Act of August 15, 1953, 67 Stat. 588 (Public Law 280), and when no other act of Congress otherwise authorizes the state to tax generally the tribes and their reservation members.

[2] Appendix pagination ceases with App. 133. The pages following, reprinting pertinent state statutes, either are unpaginated or carry the pagination from the page of the Montana Code from which taken. When citations are to the unpaginated pages, the citation will be as if paginated *seriatim* after App. 133, but the citation also will include in [ ]'s any page number from the Montana Code.

STATEMENT OF THE CASE

A. Introduction

Consolidated here are an appeal by the State of Montana, its Department of Revenue, and certain state and local officials from two separate judgments by a three-judge district court (App. 89-91 (*Moe*) and 93-95 (*Montana*) permanently enjoining imposition of certain state tax laws on members of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana (hereafter "Tribes" or "tribal parties"), residing on their Reservation, and an appeal by the Tribes and certain tribal members from the judgment of the court in *Moe* (App. 89-91) denying on the merits a permanent injunction prohibiting the imposition of certain tax laws on tribal members residing on the Reservation.

The first case, *Moe*, appealed by both the state and the Tribes, involves a challenge by the tribal parties to enforcement of the state cigarette sales tax and cigarette dealer licensing requirement as to tribal members transacting such business on the Reservation. The second case, *Montana*, from which only the state parties appeal, involves a challenge by the tribal parties to enforcement of the state personal property tax laws against tribal members residing on the Reservation.

B. General Background

The Salish, Kootenai and Upper Pend d'Oreille Indians ceded their vast aboriginal lands to the United States by the Treaty of Hell Gate of July 16, 1855, 12 Stat. 975 (App. 117-124), save for a Reservation set aside and guaranteed by the United States for the "exclusive use and benefit" of the Tribes. Article II, 12 Stat. at 976 (App. 119). Their reserved lands are known now as the Flathead Indian Reservation, Montana. It was understood by the Indians when they signed the Treaty

that they should have exclusive use of their Reservation and that no "white man . . . [shall] be permitted to reside upon the said reservation without permission of the confederated tribes. . . ." Article II, 12 Stat. at 976 (App. 119). The federal-tribal exclusivity of the Reservation was preserved and underscored by Congress in the Montana Territorial Act of May 26, 1864, 13 Stat. 85,[3] and in the Montana Enabling Act of February 22, 1889, 25 Stat. 676,[4] which retained in the United States

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[3] "... *Provided, further,* That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to Indians in said territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribes, is not, without consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but such territory shall be excepted out of the boundaries, and constitute no part of the Territory of Montana, until said tribe shall signify their assent to the President of the United States to be included within said territory, or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if this act had never passed." Sec. 2, 13 Stat. at 86.

"*And be it further enacted,* That all treaties, laws, and other engagements made by the government of the United States with the Indian tribes inhabiting the territory embraced within the provisions of this act, shall be faithfully and rigidly observed, anything contained in this act to the contrary notwithstanding. . . ." Sec. 17, 13 Stat. at 91-92.

[4] "Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . . But nothing herein . . . shall preclude the said States from taxing as other lands are taxed any lands owned or held

[Footnote continued on page 6]

absolute jurisdiction over the persons and property of Indians and which required the state to disclaim all right, title and interest to the Indian lands within its borders. The state did so by the Montana Constitution, Ordinance I, sec. 2 (1889).[5] The Flathead Reservation was opened to settlement by the Act of April 23, 1904, 33 Stat. 302, as amended. The Tribes organized in 1935 pursuant to the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§ 461 *et seq.*

Congress, by the Act of August 15, 1953, 67 Stat. 588 (known generally as Public Law 280), granted outright to certain states civil and criminal jurisdiction[6] over

[4] [Continued]
by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said States so long and to such extent as such act of Congress may prescribe." Sec. 4, 25 Stat. at 677.

[5] The language of the Montana Constitution, Ordinance I, sec. 2 (1889), Vol. 1, Revised Code of Montana (R.C.M.) 1947 at 328, is substantively identical to the pertinent language of the Enabling Act. Montana adopted and ratified in 1972 a new Constitution which became effective on July 1, 1973. Vol. 1, R.C.M. 1947 (Supp. 1974 at 43). Article I of the new Constitution provides:

> "All provisions of the enabling act of Congress (approved February 22, 1889, 25 Stat. 676), as amended and of Ordinance No. 1, appended to the Constitution of the state of Montana and approved February 22, 1889, including the agreement and declaration that all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States, continue in full force and effect until revoked by the consent of the United States and the people of Montana." Vol. 1, R.C.M. 1947 (Supp. 1974 at 44).

[6] 28 U.S.C. § 1360 and 18 U.S.C. § 1162, amended by the Act of April 11, 1968, 82 Stat. 73, 78-79, 25 U.S.C. §§ 1321-22. Public Law 280 neither granted nor tendered absolute jurisdiction. See 28 U.S.C. § 1360(b) and (c).

Indians residing in Indian Country[7] and tendered such jurisdiction to other states, including Montana. Montana, in 1963, enacted a law[8] under which it would accept complete or partial jurisdiction in either civil and/or criminal matters over the Tribes' members and Reservation, but only after receipt of a resolution from the Tribal Council, the recognized governing body, "expressing its desire that its people and lands be subject" to such jurisdiction. The Tribal Council adopted Ordinance 40-A (Revised) (attached as Appendix A to this brief) on May 7, 1965, purporting to accept, subject to several general conditions and limitations, the extension of state jurisdiction over Indians within the Reservation

> "to the extent such laws and jurisdiction relate to the subjects following:
>
> "(a) Compulsory School Attendance
>
> (b) Public Welfare
>
> (c) Domestic Relations (except adoptions)
>
> (d) Mental Health, Insanity, Care of the Infirm, Aged and Afflicted
>
> (e) Juvenile Delinquency and Youth Rehabilitation
>
> (f) Adoption Proceedings (with consent of the Tribal Court)
>
> (g) Abandoned, Dependent, Neglected, Orphaned or Abused Children
>
> (h) Operation of Motor Vehicles upon the Public Streets, Alleys, Roads and Highways

[7] Congress has defined "Indian Country" as including "all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation. . . ." 18 U.S.C. § 1151. See *Mattz* v. *Arnett*, 412 U.S. 481 (1973); *Seymour* v. *Superintendent*, 368 U.S. 351 (1962).

[8] §§ 83-801 to 83-806, R.C.M. 1947.

(i) All Criminal Laws of the State of Montana; and all Criminal Ordinances of Cities and Towns within the Flathead Indian Reservation."

As can be seen from the Ordinance, state jurisdiction to tax Indians within the Reservation clearly was not agreed to by the Tribes.[9]

The Governor, on October 8, 1965, issued a Proclamation (Appendix B to this brief), reciting the Tribal Ordinance, the Montana statute, and the consent of the four counties which lie partially within the Reservation to the assumption of partial state jurisdiction;[10] and authorizing the extension of state civil and criminal jurisdiction over the Reservation as "expressed in their approved Ordinance 40-A (Revised)."[11]

Appellees and cross-appellants do not dispute the accuracy of appellants' (hereafter "state" or "state parties") description of the modern Flathead Reservation (App. Brf. 4-7) as far as it goes, which is essentially a partial reprint of facts from the majority and dissenting opinions below (392 F. Supp. at 1312-13, 1318; App. 12-14, 23-24). But the Tribes do call this Court's attention to the remainder of the facts found by the lower court majority. In essence, they show that the Tribes provide law and order and a court system for tribal members, as well as providing community services, including health

[9] The Ordinance provides that if it be held to extend a jurisdiction more extensive than set forth in the Ordinance, then the entire Ordinance "shall be held void and of no effect from the beginning." (Appendix A to this brief, p. A-3).

[10] The counties of Flathead, Lake, Missoula and Sanders.

[11] Neither the State of Montana nor its supporting parties have contended in these suits that the extension of state jurisdiction pursuant to Public Law 280 included the right to tax Indians on the Reservation. The history of that extension, however, serves as background for these cases.

care, special assistance (burials, fires, welfare), employment assistance, housing, tribal projects (support of Indian community events) and the administration of programs unique to tribal government. These facts also show that the federal government in fiscal year 1974 expended $6,436,614.53 in its supervision of Indian affairs on the Reservation and that at least some of the federally funded programs benefitted both Indians and non-Indians. The federal programs included education, social services, housing improvement, employment assistance, adult vocational training, law and order, forestry, range management, soil and moisture conservation, road construction and maintenance, real property management, general trustee services and Indian business development. Complementing the federal effort was the expenditure of $5,398,792.86 in the same fiscal year by the Tribes from tribal funds, derived from tribal earnings through the sale and lease of tribal property and the operation of tribal enterprises (392 F. Supp. at 1314-15; App. 14-16).

C. The Cigarette Tax Case—*Moe*

Prior to April, 1972, former plaintiff Wheeler (now deceased), a member of the Tribes, leased from the Tribes, with approval of the Bureau of Indian Affairs, two tracts of land within the Reservation and held in trust by the United States. One is located in Missoula County; the other is located in Lake County. Wheeler established retail stores on both sites, where he sold, among other items, cigarettes. He did not possess a cigarette vendor's license issued by the State of Montana, § 84-5608.3, R.C.M. 1947 (App. 155 [218]), and he neither affixed the state cigarette tax stamps to cigarettes sold, as provided by § 84-5606, R.C.M. 1947 (App. 151-153 [214-16]), nor precollected the state cigarette sales tax, as provided by § 84-5606 and § 84-5606.10, R.C.M., 1947 (App. 151-153 [214-16], 157 [220]). The Tribes control the sale by tribal members of cigarettes on the

Reservation and charge an administrative fee therefor. The Tribes are authorized by their Constitution to tax cigarette sales within the Reservation, but they have not done so to date.[12]

On April 13, 1972, deputies from the Sheriff's Office, Missoula County, raided Wheeler's store located in that county and arrested him for selling unstamped cigarettes and for not possessing a vendor's license. They raided the store again on April 20, 1972, and seized 1,350 cartons of unstamped cigarettes. On both occasions the deputies tore down signs on the premises advertising the cigarette sales.

Also on April 13, 1972, deputies of the Sheriff's Office of Lake County raided Wheeler's store located in that county and arrested tribal party Clinkenbeard on identical charges.

Suit was initiated on April 25, 1972, in the United States District Court for the District of Montana, Missoula Division, by the Tribes, the Tribal Chairman, Wheeler and Clinkenbeard to enjoin enforcement of the state cigarette tax statutes, and any regulations promulgated thereunder, with respect to tribal members who sold cigarettes within the Reservation. Plaintiffs below maintained that enforcement of the state laws was (1) a violation of the United States Constitution, Art. I, sec. 8, cl. 3, whereby Congress is given the exclusive power to regulate commerce with Indian tribes; (2) an abridgement of the Treaty of Hell Gate; and (3) inconsistent with the limited jurisdiction which Montana asserts over the Tribes by virtue of Public Law 280, 67 Stat. 588. On the basis of the constitutional claim, a three-judge court was convened pursuant to 28 U.S.C. § 2284, and it presided throughout the course of proceedings below.

[12] The facts in this and the following paragraphs are recited in 392 F. Supp. at 1301 and 1313; App. 14, 40.

The district court entered four opinions in this case. The first, an unreported, unanimous *per curiam* Memorandum Opinion dated October 10, 1973 (App. 73-86), held the state statutes requiring a cigarette vendor's license inapplicable to tribal members residing on the Reservation. The court also held that tribal members residing on the Reservation were not subject to the state cigarette sales tax. The court directed that supplemental briefs be filed on whether the state laws requiring precollection by the vendor of the state cigarette sales tax applied to tribal members selling to non-Indians.

The court issued a second Order and Opinion dated May 9, 1974 (392 F. Supp. at 1300-12; App. 37-71), reaffirming its earlier holding, but also deciding that the laws of the state requiring precollection for the state of the cigarette sales tax did apply to Indians selling to non-Indians. However, one judge now dissented with respect to the holding that immunized the tribual parties from state law. (App. 62-71).[13] The defendants below moved for a rehearing, based on the dissenting opinion, and the case was reopened for further discovery and hearing.

The court issued a third Supplemental Order and Opinion, dated February 3, 1975 (392 F. Supp. at 1312-24; App. 11-35), in which it summarized the essence of the discovery (392 F. Supp. at 1312-15; App. 12-16), reached conclusions about the importance of federal and tribal contributions to the "economic well being of the Reservation," including services beneficial to non-Indians and "many programs unique to tribal government" (392 F. Supp. at 1314-15; App. 16), and reaffirmed its opin-

[13] The dissent of Judge Smith is not printed in the official report. It should commence at 392 F. Supp. 1312, prior to the Supplemental Order and Opinion starting on that page. The failure to print the dissent gives the erroneous impression that the second *per curiam* opinion was unanimous.

ion of May 9, 1974. Judge Smith again dissented (392 F. Supp. at 1317-24; App. 22-35).

The court's final expression came in an unreported Memorandum (Cross-App. 1a-2a) issued simultaneonsly with its unreported Judgment of March 19, 1975 (App. 89-91). In that Memorandum, the court recognized that its ruling that Indians on the Reservation selling to non-Indians had to precollect the state tax "will result in complicated problems of enforcement by the State of Montana" (Cross-App. 1a). The court continued:

> "We think it preferable to await a final ruling of the Supreme Court on the validity of the cigarette excise tax imposed by the State of Montana with respect to sale to both Indians and non-Indians before attempting to resolve the enforcement problems. Obviously, the solution will depend upon the Court's holding on the validity of the tax." *Id.*

D. The Income Tax Case

Subsequent to initiation of the *Moe* case, the Tribes and representative tribal members on May 17, 1972, sued to enjoin permanently the State of Montana and certain taxing officials from collecting state income tax on income earned by tribal members on the Reservation.[14] The suit was based on the same legal grounds as *Moe*. The same three-judge court was convened, but that case was settled by stipulation of the parties filed on July 30, 1973, to the effect that *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973), controlled and the state had no jurisdiction to tax the income of members of the Tribes residing on the Reservation if the members earned their income from sources within the Reservation. (The stipulation is attached as Appendix C to this Brief.)

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[14] *Confederated Salish and Kootenai Tribes* v. *The State of Montana*, Civil No. 2157 (D. Mont., filed May 17, 1972).

E. The Personal Property Tax Case—*Montana*

Attorneys for the Tribes on January 25, 1974, wrote to Montana Attorney General Woodahl, asking him to order the cessation of collection by state and local officials of the tax on personal property of tribal members permanently residing on the Flathead Reservation. The attorneys cited as authority for their position the decision in *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, the first, unreported, unanimous Memorandum Opinion in *Moe* (App. 73-86), and the stipulation filed in the income tax case. The state never formally responded, but the tribal attorneys were advised informally that the Tribes' position was rejected by the state.

Thereafter, the Tribes and certain members residing on the Reservation initiated on March 28, 1974, the personal property tax case, *Montana*, seeking judgment (1) to declare unconstitutional the enforcement against them of state statutes[15] relating to the taxation of personal property; (2) to enjoin permanently the enforcement of those statutes and related regulations; and (3) to obtain refund of such taxes paid to the date of the court's final judgment. Defendants were the State of Montana, its Department of Revenue, and certain state and local officials involved with administration and collection of the tax. As in *Moe*, a three-judge court, consisting of the same judges, was convened pursuant to 28 U.S.C. § 2284. Plaintiffs moved for summary judgment, certain defendants answered, and other defendants moved

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[15] Those statutes, the enforcement of which the plaintiffs below sought to enjoin and which the district court in its judgment (App. 95) did enjoin, were

> " the provisions of Title 53, *Rev. Mont. Code*, §§ 114, 1025-1029, and Title 84, *Rev. Mont. Code*, §§ 201, 301, 302, 404, 406, 409, 410, 4201 and 4202 and related statutes for the assessment and collection of personal property taxes generally, and in particular of personal property taxes on motor vehicles. . . ."

to dismiss the complaint. Following reopening of the *Moe* case for development of facts relating to the Flathead Reservation, *Montana* in effect was consolidated with *Moe* for purposes of discovery. Upon completion of that discovery, all parties agreed there were no genuine issues of material fact in *Montana* and, accordingly, moved for summary judgment.

On March 19, 1975, the district court entered its Order and Opinion in *Montana* and granted, on the authority of its decisions in *Moe*, summary judgment to the plaintiffs. The consequences of the court's holding were pretermitted by the court, in accordance with its Memorandum in *Moe* (Cross-App. 1a-2a), "pending a final determination [by the Supreme Court] of the constitutionality of the statutes in question with respect to their enforcement against plaintiffs" (392 F. Supp. at 1328; App. 9).[16] The dissenting judge in *Moe* again dissented, in part, with respect to the holdings as to the statutes' unconstitutionality[17] and as to the inapplicabilty of personal property tax laws on tribal members who were allotted and received fee patents (392 F. Supp. at 1328-29; App. 9-10).

SUMMARY OF ARGUMENT

I. *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973), held that the State of Arizona lacked

[16] While not clear, it appears the court was erroneously referring to the "consequences" involved in its holding in *Moe* that, while the state lacked jurisdiction over tribal members on the Reservation, those members selling cigarettes to non-members had to act as agents of the state and precollect the state cigarette tax.

[17] The state collects its personal property tax levied against vehicles, § 84-406, R.C.M. 1947 (App. 144), by conditioning the issuance of the annual vehicle registration (license tag) on payment of that tax, § 53-114(2) and (3) (App. 135-36). In addition to payment of the assessed personal property tax, the vehicle owner must pay various license fees. The tribal parties did not contest the need to pay the various registration fees, only the need to pay the assessed personal property tax.

the jurisdiction to tax the income of an Indian earned while residing on the Navajo Reservation. *McClanahan* and its precedent support the ruling below that the State of Montana lacks the jurisdiction to tax the personal property of Indians residing on the Flathead Reservation, to tax cigarette sales (purchases) by those Indians and to require those Indians to possess state licenses if they desire to sell cigarettes on the Reservation. Identically, *McClanahan* and its precedent compel reversal of the decision of the court below that the state has the jurisdiction to compel the Indians involved to precollect the cigarette tax on Reservation sales to non-Indians.

The General Allotment Act of February 8, 1887, § 6, 24 Stat. 388, 390, as amended, 25 U.S.C. § 349, does not support the state's argument that Congress granted Montana jurisdiction to enforce its tax laws on Indians who received allotments on the Flathead Reservation and now own those allotments in fee, rather than in trust, because Congress exercised its plenary power over Indians after 1887 to establish exclusive federal jurisdiction. Subsequently, Congress tendered jurisdiction to Montana, but it declined to accept it.

The assertion by the state that the immunity from state taxation inherent in the decisions below is invidious discrimination based on race and therefore unconstitutional is without merit. The tax immunity flows from the United States Constitution, Art. I, sec. 8, Cl. 3, whereby the United States Congress is invested with plenary power over Indian affairs, and the relevant treaty and federal statutes. *Morton* v. *Mancari*, 417 U.S. 535 (1974); *United States* v. *Mazurie*, 419 U.S. 544 (1975). There is no racial discrimination, but rather a lack of jurisdiction in the state to impose its tax laws.

II. These suits are not barred by 28 U.S.C. § 1341. Indian tribes have a unique position under American law. They are quasi-sovereign in some respects. They

cannot be sued without the consent of the United States. *United States* v. *United States Fidelity and Guaranty Co.*, 309 U.S. 506, 512 (1940), and they may exercise certain constitutional powers delegated to them by Congress. *United States* v. *Mazurie*, *supra*, at 556-59. They also may sue in the federal courts pursuant to a jurisdictional grant that is analogous to that possessed by the United States, 28 U.S.C. § 1362. These two legal characteristics reflect the special position occupied by tribes and the special concern of the United States towards them, their property and their rights. In matters of federal jurisdiction, Indian tribes are closely analogous to the United States. The United States could have maintained the suits below. *United States* v. *Arlington County*, 326 F.2d 929 (4th Cir. 1964). Therefore the Tribes could. *Agua Caliente Band of Mission Indians* v. *County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972). And the court below was not barred by 28 U.S.C. § 1341 from enjoining the Montana statutes involved.

ARGUMENT

I. *McCLANAHAN* v. *ARIZONA STATE TAX COMM'N* AND ITS SUPPORTING PRECEDENT CONTROL THE MERITS OF THESE CONSOLIDATED APPEALS, THUS IMMUNIZING THE TRIBAL PARTIES FROM ALL STATE TAXATION JURISDICTION HERE INVOLVED

McClanahan v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973), clearly compels the declaration and the injunction that Montana may neither tax nor license members of the Tribes who are residents of the Reservation with respect to cigarette sales on the Reservation, nor require any of them as cigarette vendors to precollect the state cigarette sales tax in transactions with non-Indians, nor impose on tribal members personal property

taxes. *McClanahan*, as the latest pronouncement of this Court on the question of Indian immunity from state taxation, offers a thorough review and restatement of the leading cases on that question and delineates the standards, which this case meets, necessary to immunize the tribal members from all state requirements involved here. In holding that the State of Arizona could not tax the income of an Indian from her employment on the Navajo Reservation, this Court read the "applicable treaties and federal statutes" pertinent to the Navajo Tribe against the "backdrop" of the doctrine of Indian sovereignty. (*Id.* at 172.) While recognizing certain qualifications to that doctrine as defined in *Worcester* v. *Georgia*, 31 U.S. 515, 557 (1832), the Court found that the aspect of that doctrine that precludes state jurisdiction continues today unless expressly revoked by Congress.

That express Congressional revocation is lacking in the instant case.

A. The District Court Correctly Held that the State Lacked Jurisdiction to Impose Its Personal Property Taxes on Tribal Members Residing on the Reservation and that It Could Not Impose Its Cigarette Sales and Licensing Tax Laws on Those Members

A comparison of the treaties and statutes relating to the Navajo Tribe analyzed in *McClanahan* with those relating to the tribal parties here demonstrates the correctness of the district court's holdings that the state lacks the jurisdiction to impose its personal property tax laws on tribal members residing on the Reservation and to impose its cigarette sales tax and licensing requirements on those members.[18]

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[18] The tribal parties contend there is no distinction in matters of state jurisdiction between tribal members residing on the Flathead Reservation and enrolled members of other tribes residing on the

[Footnote continued on page 18]

The treaties of the Navajo Tribe and of the Confederated Salish and Kootenai Tribes closely parallel each other in all relevant aspects. Article II of the Navajo Treaty of June 1, 1868, 15 Stat. 667, 668, described a reservation "set apart for the use and occupation of the Navajo tribe of Indians" and provided that

> "no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employees of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article."

The Flathead Reservation, by Article II of the Treaty of Hell Gate of July 16, 1855, 12 Stat. 975, 976 (App. 118-119), likewise was "set apart . . . for the exclusive use and benefit of said confederated tribes," and provided:

> "Nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the confederated tribes, and the superintendent and agent."

Neither treaty specifically immunizes the tribal group from state taxation, but, as recognized in *McClanahan*, the general rule of interpreting Indians' treaties in favor of the tribes, *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930), which justifies immunizing the Navajo from Arizona taxation, *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. at 175-76, also justifies immunizing the tribal parties here from Montana taxation.

[18] [Continued]
Flathead Reservation. See, *e.g.*, *Morton* v. *Ruiz*, 415 U.S. 199, 236 (1974); *United States* v. *Burland*, 441 F.2d 1199 (9th Cir. 1971), *cert. den.* 404 U.S. 842 (1971). The only individuals before the courts here, however, are tribal members, and the court below limited its decision to tribal members, except to hold invalid the cigarette tax "involved with respect to the sale of cigarettes by a member of Plaintiff Tribe on the Flathead Reservation to any Indian on the Reservation" (392 F. Supp. 1317; App. 21).

This Court in *McClanahan* also found significant the Arizona Enabling Act of June 20, 1910, 36 Stat. 557, 568, 569-70, with its disclaimer of state authority over Indian lands. 411 U.S. at 175. Nearly identical language appears in section 4 of the Montana Enabling Act of February 22, 1889, 25 Stat. 676, 677,[19] which required that state's constitution to

> "forever disclaim all right and title to . . . all lands lying within [the state] owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . ."

The state made this disclaimer in the original Montana Constitution, Ordinance I, sec. 2 (1889), Vol. 1, R.C.M. 1947 at 328. See also the disclaimer in section 2 of the Montana Territorial Act of May 26, 1864, 13 Stat. 85, 86.[20]

The Arizona Enabling Act states that it does not preclude Arizona from taxing any Indian-owned land "outside of an Indian reservation." 36 Stat. at 570. This Court recalled in *McClanahan*, *supra*, at 176, that it had construed "far more ambiguous" language than that as providing an Indian tax exemption, citing *Squire* v. *Capoeman*, 351 U.S. 1, 6 (1956). Section 4 of the Montana Enabling Act, 25 Stat. at 677, effects the same result with a slightly different approach by providing that

[19] The Enabling Act was for the States of North Dakota, South Dakota, Montana and Washington.

[20] Quoted at note 3, *supra*.

> "nothing herein, or in the ordinances herein provided for, shall preclude the said States from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, *and* has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances [including such ordinance in the Montana Constitution] shall provide that all such lands shall be exempt from taxation by said States so long and to such extent as such act of Congress may prescribe." (emphasis added.)[21]

There is no more reason here than in *McClanahan* to give such language "an especially crabbed or restrictive meaning," 411 U.S. at 176, in determining the state lacks jurisdiction to impose its tax laws.

Equally, the *McClanahan* interpretation of the Buck Act, 4 U.S.C. §§ 105 *et seq.* (1947) as Congressional protection of preexisting Indian tax immunity, 411 U.S. at 176-77, is as applicable in the instant case as it was there.

In another parallel with *McClanahan*, Montana admits that it has not assumed jurisdiction over the tribal parties for taxation purposes pursuant to the Act of August 15, 1953, 67 Stat. 588 (Public Law 280). For purposes of state taxation, the Indians within the Flathead Reservation stand in jurisdictional identity with the Indians of the Navajo Reservation, where Arizona has assumed no taxation authority pursuant to Public Law 280.

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[21] The restriction on state jurisdiction in the Montana Enabling Act is greater than that in the Arizona Act, for the latter does not require a severing of tribal relations *and* obtaining a fee patent before land held in fee by an Indian may be taxed. While an Indian may hold land in fee, the United States does not hold "Indian" land in trust for a non-Indian.

The Supreme Court of Montana, prior to the decisions below, also recognized at least twice, albeit reluctantly, that state jurisdiction over Flathead Reservation Indians, if any, was strictly limited. *State* v. *McClure*, 127 Mont. 534, 268 P.2d 629 (1954); *Security State Bank* v. *Pierre*, 162 Mont. 298, 511 P.2d 325 (1973). *Pierre* is particularly appropriate here in that it denies state court jurisdiction over a suit by a bank on a debt against a member of the Tribes for a transaction occurring on the Reservation.[22]

Finally, a comparison of the extent of state involvement at Navajo and Flathead again cuts off argument that the principles of *McClanahan* do not apply to this case.[23] The district court in the instant case held twice that while Montana expends state monies for the benefit of Indians on the Flathead Reservation, as Arizona does on the Navajo Reservation, the federal government also makes substantial expenditures in both places (392 F. Supp. at 1307 and 1314; App. 51-52 and 15-16). Furthermore, the court found that the Tribes expended almost $5.5 million in fiscal 1974 alone, nearly equal to the $6,436,614.53 the United States spent that fiscal year to benefit Indians and, to some extent, non-Indians on the Reservation (392 F. Supp. at 1314; App. 15-16).

Under these circumstances, the district court was clearly correct in its decisions that *McClanahan* compels

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[22] As this Court observed in *McClanahan*, the inability of Arizona to enforce in its courts the tax laws it sought to impose on tribal members "would seem to dispose of the case." 411 U.S. at 178-79.

[23] The tribal parties do not believe the factual matters emphasized and relied on in part by Judge Smith to support his dissent below (392 F. Supp. at 1318-19; App. 23-25) are relevant to disposition of this case. State jurisdiction over Indians residing on reservations is either granted by the United States (see 25 U.S.C. §§ 1321-22, amending 18 U.S.C. § 1162 and 28 U.S.C. § 1360), or it is not. Jurisdiction over Indians is not, as Judge Smith would have it, a matter of accretion or reliction.

the holding that Montana lacks the jurisdiction to tax the personal property of tribal members residing on the Flathead Reservation, that it cannot tax cigarette sales to those Indians, nor may it require tribal members selling cigarettes on the Reservation to obtain cigarette dealer licenses.[24]

B. The District Court Erred in Holding that Tribal Members Who Sell Cigarettes Must Precollect the Tax on Sales to Non-Indians

The tribal parties' sole disagreement with the district court in either *Moe* or *Montana* is its holding in *Moe* that tribal members selling cigarettes on the Reservation to non-Indians must precollect the tax on those sales.[25]

Williams v. *Lee*, 358 U.S. 217 (1959), established the rule that when state involvement within a reservation reaches the point of interfering with tribal self-government, that involvement becomes impermissible. 358 U.S. at 220. The district court recognized this principle, but reversed its application and reached its erroneous results. The court's reversal of the principle is found in its conclusion:

> "that under these facts the Indian seller in selling cigarettes to non-Indians is involved with non-Indians to a degree which would permit the State of Montana to require precollection of the tax imposed upon the non-Indians." (392 F. Supp. at 1311; App. 59)

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[24] 392 F. Supp. at 1307 and 1317; App. 52 and 60.

[25] The Supreme Court of Idaho has ruled the state may not force reservation Indians to precollect such taxes, *Mahoney* v. *State of Idaho Tax Commission*, 96 Idaho 59, 524 P.2d 187 (1974), *cert. denied*, 419 U.S. 1089 (1974). The Supreme Court of Washington reached a contrary conclusion. *Tonasket* v. *State of Washington*, 84 Wash.2d 164, 525 P.2d 744 (1974), appeal dismissed for want of substantial federal question, 420 U.S. 915 (1975).

It is not Indian involvement with a non-Indian that permits state jurisdiction, but the very non-Indian (state) involvement that precludes jurisdiction. *Williams* v. *Lee*, *supra*, at 220-23; *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685, 686-87 (1965).

The Montana statutory scheme contemplates the purchase of cigarettes for resale and the affixing of the state tax stamp thereto only by licensed wholesalers and licensed retailers. §§ 84-5606.11 and 84-5606.12 R.C.M. 1947, *supra* (App. 157 [220]). The value of the tax stamp is to be added to the cost of the cigarettes by the retailer (or wholesaler) and recovered from the ultimate consumer, § 84-5606.10 R.C.M. 1947, *supra* (App. 157 [220]). Thus, under the court's decision, any tribal member who retails cigarettes to non-Indians is required to prepay the tax in the first instance to his wholesaler when he purchases the cigarettes for his store.

In simple terms, therefore, he has been taxed, and he has suffered a measurable out-of-pocket loss, because he has been forced to pay money to the state, and he has been forced to do this as a precondition to operating an independent business under tribal regulation. This is a gross interference with freedom from state regulation, even assuming the tribal member can recoup all of the money he had to advance (interest-free) for state purposes.[26] He has been made an involuntary agent of the state to precollect taxes owed by non-Indians.

In addition, the court's ruling collides directly with tribal self-government, for the Tribes now regulate the sale of cigarettes by tribal members and if the Tribes ever seek to exercise their tribal constitutional authority to impose a tribal cigarette sales tax on the merchandise, they would be seriously disadvantaged, for their tribal

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[26] He may never recover the tax paid for any number of reasons, ranging from theft to spoilage of his stock. He, of course, can never recover the interest-free loan made to the state.

retailers would be forced to collect not only the tribal tax but the state tax as well. Recognition of this fact is a deterrent to the Tribes' imposing their own tax, which would preclude raising much-needed revenue.

The involuntary monetary burden placed on the Indian retailer and the *de facto* disadvantage the Tribes face in exercising their full constitutional authority, make it clear that the decision below sanctions an infringement of tribal self-government which is not permitted. *Williams* v. *Lee*, *supra*.

The lower court's decision also is at odds with *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, *supra*. There, a non-Indian who traded with Indians on the Navajo Reservation was held to be exempt from the Arizona gross proceeds tax, basically because of federal preemption in the field of Indian commerce. Here, the Indian commerce involves Indians selling to non-Indians. Surely, if a non-Indian is exempt from state tax laws because of Indian commerce, then an Indian also is exempt.

Finally, the lower court left unanswered this Court's proposition in *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. at 178-79, that Arizona had no jurisdiction to enforce its tax:

> "Arizona, of course, has neither amended its constitution to permit taxation of the Navajos nor secured the consent of the Indians affected. Indeed, a startling aspect of this case is that appellee apparently concedes that, in the absence of compliance with 25 U.S.C. § 1322(a), the Arizona courts can exercise neither civil nor criminal jurisdiction over reservation Indians. See Brief for Appellee 24-26.[19] But the appellee nowhere explains how, without such jurisdiction, the State's tax may either be imposed or collected. Cf. Tr. of Oral Arg. 38-39. Unless the State is willing to defend the position that it may constitutionally administer its tax system altogether without judicial intervention, cf. *Ward* v. *Board of County Comm'rs*, 253 U.S. 17 (1920), the admitted absence of either civil or criminal jurisdiction would seem to dispose of the case."
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[19] In light of our prior cases, appellee has no choice but to make this concession. See, *e.g.*, *Kennerly* v. *District Court*, 400 U.S. 423 (1971); *States* [sic] v. *Kagama*, 118 U.S. 375 (1886)."

It is precisely so here, for the state has not assumed general jurisdiction over tribal members on the Reservation, and there is no way the state can enforce against tribal members the tax laws in question. Jurisdiction is the power to compel, and the state lacks that power here.[27]

C. The State's Lack of Authority to Tax Indians on the Flathead Reservation is Jurisdictional, Based on the Constitution, Treaties and Applicable Federal Statutes, and Does Not Involve Racial Discrimination

The state contended in the later stages of *Moe* that the immunization of tribal members from state taxation because of a lack of jurisdiction is an unconstitutional racial discrimination against non-Indians. The district court quite correctly rejected the contention, which misconstrues the nature of the Indian immunity from state taxation. The lower court recognized that:

[27] The state does have jurisdiction over the non-Indian purchaser and can compel him to purchase only stamped cigarettes (see §§ 84-5606.18 and 84-5606.31 R.C.M. 1947 (App. 159 [222] and 164 [227]). The court below considered the burden imposed on the state in enforcing its laws against non-Indian violators too great and therefore imposed the burden on the Indians: "We agree with defendants that this remedy would be costly and ineffective. . . ." (392 F. Supp. at 1311; App. 59). The question of jurisdiction, however, is not one based on ease, convenience or a balancing of equities.

> "The exemption of Indians from the state cigarette and other taxes is not based on race. Rather, relevant treaties and federal statutes serve as the basis for the distinction between Reservation Indians and all others in the imposition of state taxes. The entire history of Indian law attests to that fact." (392 F. Supp. at 1315; App. 18)

Morton v. *Mancari*, 417 U.S. 535 (1974), dealt precisely with such a challenge, and similarly rejected it. This Court noted that the power to treat with Indian tribes is grounded in the United States Constitution, Art. I, sec. 8, cl. 3, and therefore Congressional use of that power in dealing with the special problems of Indian affairs was constitutional, 417 U.S. at 551-52, and that

> "Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationship and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." 417 U.S. at 552.

This Court then reviewed many cases in which it had long accorded Indians special treatment, with particular reference to *McClanahan*, and concluded:

> "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." 417 U.S. at 555.

The tax immunity that flows here from the state's lack of jurisdiction must likewise remain undisturbed, until the state is granted jurisdiction by explicit Congressional action. Therefore, the state's quarrel is misdirected

in terms of subject matter and parties. It is not a question of discrimination; it is a question of jurisdiction. And, it is neither this Court nor the Tribes to whom its complaint should be directed. Rather, the state has a quarrel either with Congress, for now precluding the state from unilaterally assuming jurisdiction over the Reservation, or with itself, for not unilaterally assuming that jurisdiction when Congress accorded it the opportunity.

Congress has exercised its plenary power over Indian tribes to subject Indians on various reservations to complete [28] or partial state jurisdiction or to go farther and terminate completely federal supervision and federal rights over the property and affairs of reservation Indians.[29] Congress offered Montana the choice, regardless of the desires of the Indians, to assume unilaterally civil

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[28] 28 U.S.C. § 1360 (civil) and 18 U.S.C. § 1162 (criminal) imposed jurisdiction unilaterally on Indians on reservations located (with minor exceptions) within Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. The provisions allowed other states, such as Montana, to assume this jurisdiction.

[29] See, for example, Klamath Termination Act of August 13, 1954, 68 Stat. 718, 25 U.S.C. §§ 564 *et seq;* Menominee Termination Act of June 17, 1954, 68 Stat. 250, 25 U.S.C. §§ 891 *et seq.* See also *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968), and *Kimball* v. *Callahan*, 493 F.2d 564 (9th Cir. 1974), *cert. denied*, 419 U.S. 1019 (1975), post-termination decisions wherein the courts held the states were not granted jurisdiction by Congress over Indian hunting and fishing activities on former reservation lands. A terminated tribe no longer has federal supervision over its property and its members, no longer receives federal services provided other tribes and no longer has recognized tribal self-government. Congress reasserted federal supervision and control over the Menominee Tribe by the Menominee Restoration Act of December 22, 1973, 87 Stat. 770, 25 U.S.C. §§ 903 *et seq.*, repealing the Menominee Termination Act, *supra*, this note. Congress reasserted federal jurisdiction because of the disastrous effects termination had on the Menominee Indians. See generally S. REP. NO. 93-604 and H. R. REP. NO. 93-572, 93d Cong., 1st Sess. (1973). As stated in the Senate Report at page 3, termination of federal supervision "brought the Menominee people to the brink of economic, social and cultural disaster."

and criminal jurisdiction over the Indians on the Flathead Reservation. Section 7 of the Act of August 15, 1953, 67 Stat. 588, 590. Montana declined the offer.[30]

The state, aware of its jurisdictional deficiency, seeks to remedy its problem under the guise of racial discrimination, by asking this Court to exercise a power the state once held,[31] but declined to exercise, and grant the state

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[30] In January, 1954, in response to H.R. Con. Res. 108, 67 Stat. B132 (1953), S. 2750 and H.R. 7319, 83d Cong., 2d Sess., were introduced into Congress. The bills were identical. Each was

> "to provide for the termination of Federal supervision over the trust and restricted property of the Confederated Salish and Kootenai Tribes of the Flathead Reservation in Montana and the individual members thereof, for the disposition of federally owned property acquired or withdrawn for the administration of the affairs of such Indians, and for a termination of Federal services furnished such Indians because of their status as Indians." Sec. 1.

Hearings were held, but the bills were never reported out of Committee. See *Termination of Federal Supervision Over Certain Tribes of Indians, Joint Hearings on S. 2750 and H.R. 7319 Before the Subcommittee of the Committees of Interior and Insular Affairs*, 83d Cong., 2d Sess., pt. 7, Flathead Indians, Montana (1954).

Montana was aware of the increased costs it would have if it received jurisdiction by termination. The Governor of Montana informed Congress, in conjunction with the hearings on the bills:

> "H.R. 7319 and S. 2750 are commendable in ultimate aim of granting full citizenship rights and privileges to Indians. However, suggest adequate safeguards to protect elderly full-blood Indians. Also believe Federal Government should participate during transition period in financial impact on State and county government due to increase in welfare, public roads, education, employment, health, law enforcement, housing and other services. Indian treaty rights should be fully explored. . . ." *Id.* at 869-70.

[31] A state no longer may unilaterally assume jurisdiction over Indians on a reservation. Act of April 11, 1968, 82 Stat. 78, 25 U.S.C. §§ 1321-26. The Tribes now could consent to state jurisdiction pursuant to 25 U.S.C. §§ 1321-22, and the limited jurisdiction

[Footnote continued on page 29]

jurisdiction over tribal members.[32] The state's lack of jurisdiction, however, is not founded on "race" in the sense urged by the state. The constitutional provision granting plenary jurisdiction to the United States is of equal dignity to other constitutional provisions. Neither it nor acts of Congress emanating from the authority it grants fall in the face of challenges that other constitutional provisions are or may be at odds with the challenged authority. *Morton* v. *Mancari*, *supra*; *United States* v. *Mazurie*, 419 U.S. 544 (1975). See *Parker* v. *Levy*, 417 U.S. 733 (1974), and *Secretary of the Navy* v. *Avrech*, 418 U.S. 676 (1974).[33]

This Court's opinion in *United States* v. *Mazurie*, *supra*, implicitly rejected a claim of racial discrimination by virtue of application of Indian liquor laws to non-Indians residing on fee patented land within the Wind River Reservation, and explicitly upheld the constitutional authority for those laws.

D. The District Court Properly Rejected the Argument that the General Allotment Act Gave Montana Jurisdiction Over Indians Holding Fee Patents

The state presses an argument first advanced by Judge Smith, dissenting in *Moe*, that section 6 of the General Allotment Act of February 8, 1887, 24 Stat. 388, 390, as amended, 25 U.S.C. § 349, has subjected to the civil and

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[31] [Continued]
transferred to the state could be "retroceded" pursuant to 25 U.S.C. § 1323. *Village of Walthill* v. *Omaha Tribe*, 460 F.2d 1327 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973).

[32] The Tribes do not concede that assumption of state jurisdiction would have given the state the power to impose the taxes involved here. That issue is not before the Court. See *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, at 178, n. 19.

[33] If the state is correct in its argument, not only would Title 25 of the United States Code be erased, *Morton* v. *Mancari*, *supra*, at 552, but vast sections of Titles 10 and 50 also would be erased. See *Parker* v. *Levy*, *supra*.

criminal laws of Montana all tribal members who have received fee patents pursuant to that Act. The majority opinion properly rejected the argument, noting that not a single case was cited in support of it (392 F. Supp. at 1316-17; App. 19-20). The state still does not cite a single authority recognizing a distinction between reservation Indians holding fee patents pursuant to that status as reservation Indians. They cite only section 6 of the General Allotment Act.

More importantly, the argument of the state fails to consider the constitutional basis of Congressional control over Indian affairs. The state, in effect, takes the position that once Congress has exercised its constitutional powers over Indian affairs by granting, immediately or in the future, jurisdiction to a state over Indians or their lands, the constitutional power is exhausted and the federal government can no longer legislate in that area. The proposition is startling. It makes the federal government's constitutional power over Indians a one-way ticket, good for one trip only. Constitutional power, however, is not so limited.[34]

Whether Congress changed the intent perceived by the state to be present in the General Allotment Act prior to the Indian Reorganization Act,[35] Act of June 18, 1934, 48

[34] If the state is correct, then Congress lacked authority to amend the Act of August 15, 1953, 67 Stat. 588, (Public Law 280), by the Act of April 11, 1968, 82 Stat. 73, 25 U.S.C. §§ 1321-26, or to enact the Menominee Restoration Act of 1973, 87 Stat. 770, 25 U.S.C. §§ 903 *et seq.* See note 29, *supra*. Equally, once liquor was allowed to be introduced within "Indian Country" pursuant to 18 U.S.C. § 1161, it could never be excluded again, regardless of the wishes of the United States or the tribe involved, except by state authority, in spite of 18 U.S.C. § 1154. This is not the case, however. See *United States* v. *Mazurie*, *supra*.

[35] Congress consistently demonstrated its intention to exercise continuing jurisdiction over Indian country by repeated re-enactments of the so-called Major Crimes Act, both before and after the

[Footnote continued on page 31]

Stat. 984, 25 U.S.C. §§ 461 *et seq.*, is not material to a decision here, however, for the latter Act explicitly established a firm policy of federal jurisdiction.

Section 1 of that Act, 25 U.S.C. § 461, terminated the allotment policy, and section 2, 25 U.S.C. § 462, provided:

> "The existing period of trust placed upon any Indian lands and any restriction or alienation thereof are hereby extended and continued until otherwise directed by Congress."

The district court, relying on *Mattz* v. *Arnett*, 412 U.S. 481 (1973), also correctly held that the policy of the General Allotment Act was "completely consistent with continued reservation status." 412 U.S. at 497, quoted in 392 F. Supp. at 1316 (App. 19-20).[36] The Indian Reorganization Act, of course, revoked whatever jurisdictional grant may have been intended by the General Allotment Act.

The state's position also would require a determination by this Court that Congress, in the exercise of its constitutional power over Indians, intended to create and perpetuate a confused jurisdictional skein wherein various members of a tribe would be subject to state jurisdiction because of receipt of allotments that went to fee, while other members, because they either were unallotted or retained their allotment, would not be. As this Court observed in *Seymour* v. *Superintendent*, 368 U.S. 351, 358 (1962):

> "For that argument rests upon the fact that where the existence or nonexistence of an Indian reservation, and therefore the existence or non-existence of

[35] [Continued]

General Allotment Act. See section 9 of the Act of March 3, 1885, 23 Stat. 362, 385; section 328 of the Act of March 4, 1909, 35 Stat. 1088, 1151; the Act of June 28, 1932, 47 Stat. 336; the Act of June 25, 1948, 62 Stat. 683, 757, 18 U.S.C. § 1151, as further amended by section 25 of the Act of May 24, 1949, 63 Stat. 89, 94.

[36] See also *Seymour* v. *Superintendent*, 368 U.S. 351 (1962).

federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal government. Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of [18 U.S.C.] § 1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid." (footnote omitted).

The state would create here a similar nightmare on the basis of a federal intent or policy it perceives in an 1887 law, even though Congress explicitly has legislated to the contrary.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE CASES BELOW WERE NOT BARRED BY 28 U.S.C. § 1341 AND THAT FEDERAL JURISDICTION EXISTS WITH RESPECT TO THE TRIBES PURSUANT TO 28 U.S.C. § 1362 AND THE INDIVIDUAL TRIBAL MEMBERS PURSUANT TO 28 U.S.C. § 1343 AND 42 U.S.C. § 1983

The state attacks the jurisdiction of the federal courts here on the ground that the cases below fall within no widely recognized exception to 28 U.S.C. § 1341.[37] The district court, however, showed (392 F. Supp. 1301-05; App. 41-47) that an exception for these tribal parties to the bar of section 1341 fully conformed to cases where the bar has been lifted because the United States had a "special interest" in the parties affected by the challenged tax, *United States* v. *Arlington County*, 326 F.2d 929, 931 (4th Cir. 1964). This exception was recognized

[37] The state raises no matter on this question that was not already presented in its jurisdictional statement to the Court.

in a case brought by an Indian tribe in which the United States was not a party, *Agua Caliente Band of Mission Indians* v. *County of Riverside*, 442 F.2d 1184, 1185-86 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972). There, as here, the tribe had a right to sue to protect its property from being taxed, even without the United States as a party, because the tribe could have been a "co-plaintiff" with the United States. *Id.*

As the district court observed, the courts have recognized that the legislative history of section 1341 showed that Congress was intent on correcting

> "the disparity between the rights of a citizen of a state, whose only means of litigating his disputed tax liabilities was a [state court] suit for refund of prepaid taxes, and those of foreign corporations and nonresidents, doing business within the state and incurring tax obligations, who could [because of diversity jurisdiction] obtain in the federal courts equitable relief denied to citizens of the state." *United States v. Livingston*, 179 F. Supp. 9, 11 (E.D.S.C. 1959), *aff'd*, 364 U.S. 281 (1960).

This Court has recognized there is "an unbroken line of authority [including *Livingston*] and convincing evidence of legislative purpose," *Dept. of Employment* v. *United States*, 385 U.S. 355, 358 (1966), pointing to an exception of section 1341 where the United States and its instrumentalities are involved.

There is no reason to think that the "special interest" of the United States in these tribal parties is anything less than its interest in an unquestioned federal "instrumentality."

Recognizing that the status of the federal instrumentality doctrine, now open to question by *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 150-51 (1973), and *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. at 169-70 (392 F. Supp. at 1303, n. 9; App. 43, n. 9),

the lower court did not base its opinion on that doctrine, but rather on the legitimate and logical exception to section 1341 that the United States clearly does have a "real and significant interest" in the affairs of both the Tribes and their constituent members, by virtue of the Treaty of Hell Gate, *supra*, and the long line of cases dealing with federal trust responsibility to reservation Indians. See, *e.g.*, *Seminole Nation* v. *United States*, 316 U.S. 286, 297 (1942). The federal government clearly could have brought *Moe* and *Montana* on behalf of the Tribes without bar by section 1341, for it has done so in similar situations where it has a "special interest", such as maintaining its policies and programs for members of the armed forces, *United States* v. *Arlington County*, *supra*, an interest that might be considerably less than its interest in and trust responsibility toward the Tribes. And the fact that the federal government did not bring the suit does not preclude the tribal parties from instituting the litigation. See, *e.g.*, *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365 (1968).

In fact, Congress, in recognition of the unique status of Indian tribes [38] and their needs, granted to tribes by 28 U.S.C. § 1362 a jurisdiction not granted any other entity.[39] This jurisdictional grant is the counterpart of

[38] See, e.g., Section 10(e) of the Federal Power Act of June 10, 1920, 41 Stat. 1063, 1068-69, as amended, 16 U.S.C. § 803(e), which specifically treats Indian tribes like the United States by providing that

> "when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 476 of Title 25 [U.S.C.], fix a reasonable annual charge for the use thereof. . . ."

[39] ". . . The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the In-

[Footnote continued on page 35]

that aspect of tribal sovereignty which precludes suit against an Indian tribe without the consent of the United States. *United States* v. *United States Fidelity and Guaranty Co.*, 309 U.S. 506, 512 (1940).[40]

The combination of this jurisdictional grant and tribal immunity make an Indian tribe closely analogous to the United States in matters of federal jurisdiction, thus permitting the district court to hear these cases.

[39] [Continued]

terior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362.

[40] Certainly, should section 1341 be held a bar to these suits, the United States, as trustee for the Tribes and their members, in light of the decisions below, would be compelled to file identical suits immediately, the court below compelled to rule as it did and the case presented again to this Court.

CONCLUSION

For the foregoing reasons, the portions of the judgments appealed from in No. 74-1656 should be affirmed and the portion of the judgment appealed from in No. 75-50 should be reversed, with directions to enter judgment declaring invalid and enjoining the enforcement of the requirement that tribal members must precollect the Montana state cigarette tax on sales within the Flathead Reservation by those members to non-Indians.

Dated this 22nd day of December, 1975.

Respectfully submitted,

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APPENDIX

APPENDICES

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA

Tribal Ordinance 40-A (Revised)

ORDINANCE OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD INDIAN RESERVATION, AMENDING SECTIONS AND CHAPTERS OF THE "ORDINANCE OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, NO. 36-A (Revised) ADOPTED MAY 23, 1962", HEREINAFTER REFERRED AS THE "OFFICIAL CODE OF ORDINANCES", AS FOLLOWS:

Be it enacted by the Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Dixon, Montana:

That Chapter 1, Section 2, Jurisdiction, of the Official Code of Ordinances be and the same is hereby amended to add subsections 1 and 2 of this ordinance following paragraph three to read as follows:

"Subsection 1: Subject to the conditions and limitations expressed in Subsection 2 hereof, the laws and jurisdiction of the State of Montana, including the judicial system of the State, are hereby extended pursuant to, and subject to the conditions in, the Act of the Montana Legislature of February 27, 1963, Laws of Montana, 1963, Vol. 1, Chap. 81, P. 170, to Indians within the Flathead Reservation to the extent such laws and jurisdiction relate to the subjects following:

(a) Compulsory School Atendance

(b) Public Welfare

(c) Domestic Relations (except adoptions)

(d) Mental Health, Insanity, Care of the Infirm, Aged and Afflicted

(e) Juvenile Delinquency and Youth Rehabilitation

(f) Adoption Proceedings (With consent of the Tribal Court)

(g) Abandoned, Dependent, Neglected, Orphaned or Abused Children

(h) Operation of Motor Vehicles upon the Public Streets, Alleys, Roads and Highways

(i) All Criminal Laws of the State of Montana; and all Criminal Ordinances of Cities and Towns within the Flathead Indian Reservation.

Subsection 2. The effectiveness of Subsection 1 hereof is conditioned upon the following:

(a) Concurrent jurisdiction remains (where applicable with Federal Courts) with the Tribal Court and in the Tribal Government of all matters referred to in Subsection 1; and any matter initiated in either a state or Federal Government Court or the Tribal Court shall be completed and disposed of in that Court, and shall not be subject to re-examination in the courts of the other jurisdiction.

(b) No person, once convicted of a crime falling within the jurisdiction of the State or Federal Government, or the Tribes pursuant to this ordinance, shall be punished for the identical act in the courts of the other jurisdiction, but shall be accorded the benefit of the doctrine of former jeopardy as if the separate jurisdictions were one.

(c) This ordinance is subject to possible referendum of the eligible voters of the Confederated Tribes pursuant to Article IX of the Constitution of the Confederated Tribes, and if a referendum is authorized and this ordinance disapproved by a majority under the conditions set forth in Article IX this ordinance

shall be void and of no effect to transfer any jurisdiction to the State of Montana and its judicial system.

(d) All jurisdiction of the Confederated Tribes under their Constitution and Bylaws, and ordinances enacted pursuant thereto, and of the Federal Government under the United States Criminal Code, to the extent not expressly transferred by Subsection 1 hereof, remains in the Confederated Tribes and in the Federal Government respectively to the same extent as if this ordinance had not been adopted.

(e) If any provision of the Act of the Montana legislature of February 27, 1963, Laws of Montana 1963, Vol. 1 Chap. 81, or of this ordinance shall be held invalid, or if this ordinance be held to extend a jurisdiction more extensive than set forth herein, or if any condition herein be not complied with or be held invalid or ineffective, then this entire ordinance shall be held to be void and of no effect from the beginning.

(f) In the event of any alleged violation of the Civil Rights of Tribal members by operation of this ordinance, the Tribal Council reserves the right to conduct an independent investigation of the alleged act; to seek redress in a court of competent jurisdiction; and to review the ordinance upon the validation of any such alleged offense.

Provided further that any sentences or convictions, lawfully inflicted under the provisions of this ordinance, shall not be affected by subsequent cancellation or voidance of this ordinance."

All ordinances and parts of ordinances in conflict herewith are hereby repealed (specifically Tribal Ordinance 40-A approved May 19, 1964).

A-4

CERTIFICATE

The foregoing ordinance was adopted by the Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana pursuant to the Act of the United States Congress of August 15, 1953; 67 Stat. 588, as amended (18 U.S. Code Section 1162; 28 U.S. Code Section 1360); the Act of the Legislature of Montana, February 27, 1963, Laws of Montana 1963, Vol. 1, Chap. 81, p. 170; and Article VI, Sec. 1, subsections (c), (n) and (q) of the Constitution of the Confederated Tribes, pursuant to Section 16 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, the 5th day of May, 1965, by a vote of 7 for, 0 against, and 0 not voting.

/s/ Walter W. McDonald
WALTER W. MCDONALD
Chairman, Tribal Council

ATTEST:

/s/ Alvin E. Sloan
ALVIN E. SLOAN
Secretary

/s/ P. T. LaBreche
P. T. LABRECHE
Superintendent
5/15/65

B-1

PROCLAMATION

WHEREAS, Chapter 81, Montana Session Laws of 1963, provides for the extension of criminal and civil jurisdiction of the State of Montana to the extent authorized by federal law and regulations upon The Confederated Salish and Kootenai Indian Tribes; and

WHEREAS, The act requires the Proclamation of the Governor of the State when the Tribal Council has created the proper authority and requested such Proclamation from the Governor of the State; and

WHEREAS, Such proper documents have been prepared entitled "Tribal Ordinance 40-A (Revised)" under date of May 5, 1965; and

WHEREAS, Approval has been secured from the Counties of Sanders, Lake, Flathead and Missoula; and

WHEREAS, It appears all things required in Chapter 81, Montana Session Laws of 1963, have been substantially completed;

NOW, THEREFORE, By the power vested in me, as Governor of the State of Montana, I, Tim Babcock, hereby proclaim that criminal and civil jurisdiction of the State of Montana and its subdivisions does extend to The Confederated Salish and Kootenai Tribes as expressed in their approved Ordinance No. 40-A (Revised), and Chapter 81, Montana Session Laws of 1963, and I further declare that sixty days from the date of October 8, 1965, such criminal and civil jurisdiction as previously described shall be in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Montana to be affixed. DONE at the City of Helena, the Capital, this 8th day of October, in the year of our Lord, One Thousand Nine Hundred and Sixty-five.

/s/ Tim Babcock
TIM BABCOCK
Governor

[SEAL]

ATTEST:

/s/ Frank Murray
FRANK MURRAY
Secretary of State

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

FILED, July 30, 1973, John J. Parker, Clerk,

[Illegible], Deputy Clerk]

Civil No. 2157

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA ("TRIBES"), ET AL.,
Plaintiffs,

v.

THE STATE OF MONTANA, ET AL.,
Defendants.

STIPULATION

The parties to this action, through their counsel of record, hereby agree and stipulate to a final disposition of the above-captioned case as follows:

1. That the decision of the Supreme Court of the United States, on March 27, 1973, in *McClanahan* v. *Arizona State Tax Commission*, No. 71-834, controls the merits of this action by holding that the State does not have jurisdiction to tax an enrolled member of an Indian tribe on income earned from sources on his or her reservation.

2. That the individual plaintiffs in this action are enrolled members of the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, Montana, and are residents within the exterior boundaries of that Reservation and their income for purposes of this suit is derived from sources within the Reservation, specifically from employment with the Tribes.

3. That the plaintiffs' income earned from employment with the Tribes is clearly not subject to Montana individual income tax under the provisions of Title 84, Chapter 49, Revised Codes of Montana, 1947.

4. That defendants will voluntarily comply with the *McClanahan* decision by terminating all efforts to impose the Montana individual income tax upon the income of plaintiffs, and those similarly situated, who are enrolled members of the Confederated Salish and Kootenai Tribes and earned their income from sources within the exterior boundaries of the Flathead Indian Reservation. Defendants also will, with respect to the class of plaintiffs, withdraw all Warrants of Distraint, release all tax liens, and refund in accordance with Montana law all individual income taxes.

5. That this action will be voluntarily dismissed by the plaintiffs by agreement of the parties.

DATED this 17th day of July, 1973.

CONFEDERATED SALISH AND
KOOTENAI TRIBES, et al.

By: /s/ Richard A. Baenen
RICHARD A. BAENEN
Attorney for Plaintiffs

STATE OF MONTANA, et al.

By: /s/ Edward Jene Bell
EDWARD JENE BELL,
Chief Tax Counsel,
Department of Revenue
Attorney for
Defendants